89-215

Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

KARIN APARO
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE UNITED STATES OF AMERICA

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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE PETITIONER DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT REVOKED HER YOUTHFUL OFFENDER ELIGIBILITY FOR THE CRIME OF CONSPIRACY TO COMMIT MURDER FOR THE SOLE REASON THAT STATE LAW PROHIBITED ELIGIBILITY BECAUSE SHE WAS ALSO CHARGED, BUT NOT CONVICTED, OF THE CRIME OF MURDER?

II. WAS THE PETITIONER DENIED DUE PROCESS OF LAW BY THE CONNECTICUT SUPREME COURT'S DISMISSAL OF HER APPEAL?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE UNITED STATES OF AMERICA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the order

for the Supreme Court for the State of Connecticut entered in this proceeding on April 26, 1989. An order denying reargument was entered on June 6, 1989.

OPINION BELOW

There was no written opinion issued by the trial court or the Connecticut Supreme Court. The trial court issued two opinions from the bench that are reproduced in Petitioner's appendix. The Connecticut Supreme Court entered an order dismissing Petitioner's appeal on April 26, 1989 and entered an order on June 6, 1989 denying Petitioner's motion for reargument.

JURISDICTION

The order of the Connecticut Supreme Court denying reargument on the Motion to Dismiss was rendered on June 6, 1989. The Petition for Writ of Certiorari was filed within sixty (60) days of the order. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1)

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

(2) Connecticut General Statutes Sections 54-76b and 54-76o which are reproduced in the Appendix, infra.

STATEMENT OF THE CASE

The Petitioner was charged in a two count information with the crimes of murder and conspiracy to commit murder in violation of Connecticut General Statutes (hereinafter C.G.S.) §§53a-48(a), 53a-54, 53a-54(a) and 53a-8. The State alleged that when the Petitioner was fifteen years of age she entered into a conspiracy with her boyfriend to kill her mother and with aiding the boyfriend in the murder when she was sixteen years old. Because the crimes were committed when she was sixteen, the Petitioner was eligible for treatment as a youthful offender under Connecticut's Youthful Offender

Act, Conn. Gen. Stat. §§54-76b, et. seq. (hereinafter "Y.O. Act"). (Appendix at 1-12).[1] The Y.O. Act provides a defendant between the ages of 16 and 18 with protections similar to juveniles. If Y.O. eligibility is granted the youth's file is sealed, proceedings are held in private and incarceration cannot exceed a term of three (3) years. Although a defendant is entitled to a trial, the trial must be to the court and not a jury.

Connecticut's Y.O. Act defines a youthful offender in part as "... a youth who has committed a crime or

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[1]The conspiracy count, but not the murder count covered a time period and alleged that Petitioner entered into the conspiracy when she was fifteen.

crimes which are not Class A felonies...." C.G.S. §54-76b (Appendix at 2). Murder is a Class A felony under Connecticut law, while conspiracy to commit murder is a Class B felony.

Pursuant to the Y.O. Act, Petitioner applied for youthful offender eligibility. After a hearing the court granted eligibility on the conspiracy count but denied it as to the murder count solely on the ground that it was a Class A felony. (May 25, 1988 transcript at 36-38) (Appendix at 13-35). Petitioner argued that to deny a defendant Y.O. eligibility solely on the basis that he is charged with a Class A felony constitutes a denial of due process. (May 25, 1988 transcript

at 4-11); (Appendix at 20-21). Petitioner's Memorandum In Support of A Motion For Investigation of Eligibility To Be Adjudged A Youthful Offender dated March 15, 1988).

In denying Y.O. eligibility on the murder count, the trial court stated that the argument against automatic disqualification for Class A felonies had merit, but the court felt it was bound by dictum in a case decided by the Connecticut Supreme Court, State v. Longo, 192 Conn. 85, 469 A.2d 1220 (1984). (Appendix at 30). In that case, the Connecticut Supreme Court suggested that a defendant is disqualified from Y.O. eligibility if charged with a Class A felony. An

exception was noted as to the denial of Y.O. eligibility on the murder count. (Appendix at 33).

Thereafter the State moved for reargument. On July 8, 1988, forty four days after Petitioner was granted Y.O. eligibility on the conspiracy count, the court revoked the status solely on the ground that it had denied eligibility on the murder count. (July 8, 1988 transcript at 3-6). (Appendix at 38-40). Petitioner argued that she had certain entitlements by virtue of state law once Y.O. eligibility was granted on May 25, 1988 and to revoke that status solely on the ground that she was charged with a Class A felony in the murder count denied her due

process. (July 8, 1988 transcript at 8, 14-16). (Appendix at 55-57). Petitioner reincorporated at the July 8, 1988 hearing her argument that automatic disqualification on the murder count solely because she was charged, but not convicted of a Class A felony denied her due process. (July 8, 1988 transcript 12-13). (Appendix at 52).

Petitioner then filed an appeal to the Connecticut Supreme Court and filed a brief raising the foregoing due process issues. After the brief was filed, the State moved to dismiss on the grounds that the trial court's order was not a final judgment and that the due process claims were without

merit. (Appendix at 66-80). Petitioner filed a reply and the Connecticut Supreme Court dismissed the appeal without an opinion. (Appendix at 81). Petitioner filed a motion for reconsideration again raising the due process claims. The State filed an objection and the Court denied the motion on June 6, 1989. (Appendix at 82).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE CONNECTICUT COURT IS IN CONFLICT WITH THE DECISION OF THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK IN PEOPLE V. DRUMMOND, 40 N.Y. 2d 990, 391 N.Y. S.2d 67 (1976), cert. denied sub nom New York v. Luis J., 431 U.S. 908, 97 S. Ct. 1706, 52 L. Ed. 2d 394 (1977).

ARGUMENT

I

THE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S REVOCATION OF YOUTHFUL OFFENDER ELIGIBILITY ON THE CONSPIRACY COUNT BASED UPON THE FACT THAT IT HAD PREVIOUSLY DENIED YOUTHFUL OFFENDER ELIGIBILITY ON THE MURDER COUNT AND WHEN THE DENIAL OF YOUTHFUL OFFENDER ELIGIBILITY ON THE MURDER COUNT WAS BASED SOLELY ON THE FACT THAT THE PETITIONER WAS CHARGED WITH A CLASS A FELONY.

The Connecticut Youthful Offender Act was enacted in the interest of protecting the liberty interests of persons between sixteen and eighteen years of age. In enacting this legislation, members of the Connecticut

House of Representatives cited three main benefits it would provide: 1) it would eliminate the arbitrariness which had occurred by leaving to the trial judge the determination of whether to transfer such persons from the juvenile to the adult court; 2) it would allow greater rehabilitation potential for such youths and; 3) it would prevent youths from bearing the life-long stigma of criminal conviction. 1971 P.A. 72, House at 1230-42, S.B. 497, Senate, March 25, 1971, at 652, 655 (remarks of Sen. Jackson).

The Youthful Offender (hereinafter "Y.O.") provisions create a liberty interest for youths which is specifically geared to their station in life

and the special needs of youths recognized by the legislature. In addition to freeing those adjudged to be Y.O.'s from the stigma of conviction, the Act created a panoply of benefits to be accorded youths charged with crimes.

A person found eligible for treatment as a Y.O. must be held in segregation from defendants over the age of eighteen, C.G.S. §54-76h; the court is granted, in §54-76j, sentencing alternatives not otherwise available in the penal code. The records of a defendant who is found guilty on a charge of being a Y.O. must remain confidential under §54-76l and must be erased upon discharge of his sentence or his attaining the age of

twenty-one, if he has not subsequently been convicted of a felony, §54-76o. Most importantly, the Y.O. Act provides that all proceedings against the youth be held in private, §54-76h. (Appendix at 6). Thus, the defendant is protected from the direct and collateral consequences which attach on a criminal conviction.

Such state created rights cannot be abrogated without due process of law. Vitek v. Jones, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed.2d 552 (1980); Paul v. Davis, 424 U.S. 693, 710-11, 96 S. Ct. 1155, 47 L.Ed. 2d 405 (1976).

The Petitioner was denied her constitutional right to due process of law when the trial court took away her

status as a person eligible to be adjudged a youthful offender on the conspiracy count solely because she was also charged with the Class A felony of murder. Connecticut's Y.O. Act requires the court to weigh a number of factors before deciding whether to grant or deny eligibility. Conn. Gen. Stat. §54-76d(b). Among those factors are the following: The severity of the offense and the complete probation report. The weighing of these factors is the process due an accused who applies for Y.O. eligibility. Instead of weighing these factors the trial court focused on one consideration, to wit: The accusation of murder. In so doing the trial court failed to afford

Petitioner the process mandated by State law, and thereby denied her due process.

B. The Trial Court's Reliance On The Unproven Allegations Of The Murder Count As The Basis For Revoking Youthful Offender Eligibility On The Conspiracy Count Denied The Defendant Due Process Of Law.

The trial court judge was of the view that because he denied Y.O. eligibility on the murder count, he was compelled to revoke the Petitioner's eligibility on the conspiracy count.

The Connecticut Youthful Offender Act was patterned after the New York Act. 1971 P.A. 72, House at 1235 (remarks of Rep. Bingham). The original New York statutes conditioned eligibility for youthful offender

status on the highest crime charged in the indictment, while the Connecticut statutes do not so qualify eligibility. Rather, the definition of a youthful offender only excludes those who have "committed" Class A felonies. C.G.S. §54-76b.

The New York Statutes' reliance on the charge to determine eligibility was found to violate the due process clause in People v. Drummond, 40 N.Y.2d 990, 391 N.Y.S. 2d 67 (1976) cert. denied sub nom., New York v. Luis J., 431 U.S. 908, 97 S. Ct. 1706, 52 L. Ed.2d 394 (1977). The Drummond court relied on the reasoning of Justice Rabin's dissent in People v. Santiago, 51

A.D.2d 1, 379 N.Y.S.2d 843 (1975), one of the companion cases below, where it was said:

> In my view, the statute also fails to comport with the concept of due process of law. "Even though the concept of due process of law is not final and fixed *** [its] limits are derived from considerations that are fused in the whole nature of our judicial process" (Rochin v. California, 342 U.S. 165, 170). By according a decisive role in the determination of which youths are eligible for youthful offender treatment to nothing more substantial than a written statement of unproven allegations (see CPL 1.20, subd 3), the statute offends reasonable notions of fairness. There is no reasonable justification or necessity for fixing the degree of the crime charged as the determinative factor. It is clear than an indictment does not survive a trial and verdict; it should play no part in determining the type of post conviction treatment accorded to youngsters otherwise eligible for youthful offender consideration (see,

People v. Brian R., 78 Misc. 2d 616, 619, aff'd 47 A.D.2d 599.) People v. Santiago, supra at 15.

To the extent that Connecticut's Youthful Offender Act is interpreted to disqualify a youth from Y.O. eligibility solely because he is charged with a Class A felony,[2] it violates the due process clause of the Fourteenth Amendment for the reasons stated in People v. Santiago, supra. As Justice Rabin suggests, the Act would violate the Petitioner's right to a presumption of innocence if applied as it was in this case. Thus, the writ

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[2]Petitioner argued in the trial court that the plain language of Section 54-76b of Connecticut General Statutes disqualifies a youth from Y.O. eligibility only if he has committed a Class A felony. (Appendix at 17).

should be granted to remedy the fact that the citizens of Connecticut presently enjoy less protection under the Due Process Clause of the United States Constitution, Amendment XIV than their neighbors in New York with respect to the same statutory scheme.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 L. Ed. 481 (1895); Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed.2d 468 (1978) (citing Taylor v. Kentucky, 436 U.S.

478, 98 S. Ct. 1930, 65 L.Ed.2d 468 (1978); Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed.2d 12 (1976), and; In re Winship 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970)).

II.

THE CONNECTICUT SUPREME COURT'S DISMISSAL OF PETITIONER'S APPEAL VIOLATED HER RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

Where the state has provided for appeal as a matter of right, there must be a meaningful opportunity to pursue that appeal. See e.g., Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

> In short, when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution - and, in particular with the Due Process Clause.

Evitts v. Lucey, 469 U.S. 387, 401, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). This principle is as true with respect to the dismissal of her appeal as it is to the revocation of Petitioner's youthful offender eligibility.

The dismissal order by the Connecticut Supreme Court fails to state any grounds. Assuming, however, arguendo, that the dismissal was for lack of a final judgment it denies Petitioner due process of law. The principal benefit Petitioner was granted when she was conferred Y.O.

eligibility was to have her matter adjudicated in private.[3] Because her trial will now be public she has no remedy available to protect her privacy right without an immediate resolution of her due process arguments by the Connecticut Supreme Court. If Petitioner is tried publicly now, a reversal by the Connecticut Supreme Court after a conviction cannot restore

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[3]The conspiracy count was different from the murder count in one significant respect. It covered a time period when the Petitioner was fifteen years of age. Normally fifteen year olds are prosecuted as juveniles. The murder count is limited to a time period when Petitioner was sixteen. Consequently privacy was more important on the conspiracy count than on the murder count.

to Petitioner the right of privacy she was granted when she was bestowed with Y.O. eligibility on May 25, 1988.

The Connecticut Supreme Court has held that the denial of Y.O. eligibility is not a final judgment. State v. Longo, 192 Conn. 85, 469 A.2d 1220 (1984). However once Y.O. eligibility is granted, as was the case here, any attempt to divest a defendant of that status is appealable. The Connecticut Supreme Court so stated in Longo, supra:

> "... the dispositive issue is whether the defendant already enjoys a right that the order threatens irreparably. If so, the order may be appealed immediately....

Id. at 469 A.2d at 1225.

Not only was Petitioner entitled to the statutory right of privacy when Y.O. eligibility was granted on May 25, 1988, Conn. Gen. Stat. §54-76h, but she was also granted the right that "no further action [shall] be taken on the information ...." Conn. Gen. Stat. §54-76d(b). The trial court's order revoking Y.O. eligibility and in unsealing the information violated the foregoing statutory right. Without an immediate resolution of the correctness of the trial court's revocation order Petitioner's right to these statutory protections will be forever lost. Access to an appeal may not be denied arbitrarily. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d

891(1956). "In cases like Griffin and Douglas, due process concerns were involved because the states involved had set up a system of appeals as of right but had refused to offer each Petitioner a fair opportunity to obtain an adjudication on the merits of his appeal." Evitts v. Lucey, supra, 835-836.

This case involves the very interests implicated in an interlocutory appeal based on double jeopardy protections, i.e., the right not to be tried on the charges. The dismissal negates the protections of the youthful offender provisions created by state law.

In this case, as in cases involving a claim of double jeopardy, "The Defendant makes no challenge whatsoever to the merits of the charge against [her]... Rather [s]he is contesting the very authority of the Government to hale [her] into court to face trial on the charge against [her]." Abney v. United States, 431 U.S. 651, 660, 97 S.Ct. 2034, 52 L.Ed.2d 651(1977) (citations omitted). The Petitioner respectfully submits that having been admitted to eligibility under Connecticut's youthful offender statutes, she was and is entitled not "to endure the personal

strain [and] public embarrassment" Id. at 661, of a public trial on the charge of conspiracy to commit murder.

CONCLUSION

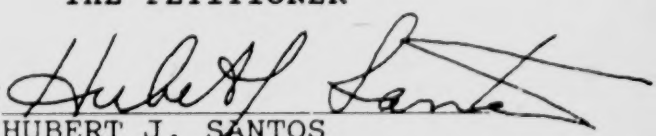
Petitioner was denied due process in the instant matter for two reasons: (1) instead of determining Y.O. eligibility by weighing various factors as required by State law (Conn. Gen. Stat. §54-76d(b)) the trial court revoked eligibility based solely on the fact that Petitioner was charged with the Class A felony of murder; (2) in revoking Y.O. eligibility based solely on the fact that Petitioner was also accused of murder violated fundamental principles of fairness and the presumption of innocence. The

Petitioner in the instant case may be eventually acquitted or found guilty of a crime other than a Class A felony, such as manslaughter. Under these circumstances she should have been granted Y.O. eligibility. Disqualifying her, however, based solely on the accusation of murder denies her the opportunity of eligibility for the Y.O. program.

Once Y.O. eligibility was granted for conspiracy to commit murder on May 25, 1988, Petitioner was the recipient of certain statutory entitlements under Connecticut law. These entitlements, the most important of which was privacy, could not be taken away without due process. The process that

was due was the procedure spelled out in Conn. Gen. Stat. §54-76d(b). That section requires the trial court to weigh various factors. That was not done. Instead the accusation of murder was enough to result in revocation of Petitioner's Y.O. eligibility forty four days after it was granted.

THE PETITIONER

BY 

HUBERT J. SANTOS
A Member of the Bar of
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APPENDIX

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CONNECTICUT'S YOUTHFUL OFFENDER ACT
Conn. Gen. Stat. §54-76b thru §54760

Sec. 54-76b. **Youthful offenders: Definitions.** For the purpose of sections 54-76b to 54-76n, inclusive, "youth" means a minor who has reached the age of sixteen years but has not reached the age of eighteen years; and "youthful offender" means a youth who has committed a crime or crimes which are not class A felonies, who has not previously been convicted of a felony or been previously adjudged a youthful offender, or been afforded a pretrial program for accelerated rehabilitation under section 54-56e, and who is adjudged a youthful offender pursuant to the provisions of said sections. The interstate compact on juveniles, except the provisions of article four thereof, shall apply to youthful offenders to the same extent as to minors below sixteen years of age.

Sec. 54-76c. Motion for investigation of eligibility to be adjudged youthful offender. In any case where an information or complaint has been laid charging a defendant with the commission of a crime, and where it appears that the defendant is a youth, upon motion of the defendant, his counsel, the state's attorney or the prosecuting attorney, as the case may be, to the court having jurisdiction that an investigation be made of such defendant for the purpose of determining whether he is eligible to be adjudged a youthful offender, the

court shall, but only as to the public, order such information or complaint to be filed as a sealed information or complaint. The court on its own motion, may but only as to the public, order the information or complaint sealed in the case of a youth charged with crime.

Sec. 54-76d. Determination by court. (a) If the court grants such motion or if the court on its own motion determines that the defendant should be investigated hereunder and the defendant consents to physical and mental examination, if deemed necessary, and to investigation and questioning, and to a trial without a jury, should a trial be had, the information or complaint shall be held in abeyance and no further action shall be taken in connection with such information or complaint until such examinations, investigation and questioning are had of the defendant. Investigations under sections 54-76b to 54-76n, inclusive, shall be made by an adult probation officer. When the information or complaint charges commission of a felony, the adult probation officer shall include in the investigation a summary of any unerased juvenile record of adjudications of the defendant.

(b) Upon the termination of such examinations, investigation and questioning, the court, in its

discretion based on the severity of the crime, which shall also take into consideration whether or not the defendant took advantage of the victim because of the victim's advanced age or physical incapacity, and the results of the examinations, investigation and questioning, shall determine whether such defendant is eligible to be adjudged a youthful offender. If the court determines that the defendant is eligible to be so adjudged, no further action shall be taken on the information or complaint and the defendant shall be required to enter a plea of "guilty" or "not guilty" to the charge of being a youthful offender. If the court determines the defendant ineligible to be so adjudged, it shall order the information or complaint to be unsealed and the defendant shall be prosecuted as though the proceeding hereunder had not been had.

Sec. 54-76e. Trial to determine youthful offender status. If the defendant enters a plea of "not guilty" or if the court on its own motion so directs, the defendant shall be tried for the purpose of determining whether he shall be adjudged a youthful offender. The trial shall be held by the court without a jury.

Sec. 54-76f. Statements of defendant inadmissible. No statement, admission or confession made by the defendant to

the court or to any person designated by the court to conduct the examinations, investigation and questioning referred to in section 54-76d shall ever be admissible as evidence against him or his interest, except that the court may take such statement, admission or confession into consideration at the time of sentencing such defendant, if the defendant has been adjudged a youthful offender, or has been found guilty of the crime charged in the information or complaint upon which the proceeding hereunder were based, or any subsequent crime.

Sec. 54-76g. Judgement of a youthful offender status. If the defendant enters a plea of guilty to the charge of being a youthful offender or if, after trial, the court finds that he committed the acts charged against him in the information or complaint, the court shall adjudge the defendant to be a youthful offender and the information or complaint shall be considered a nullity and of no force or effect.

Sec. 54-76h. Proceedings private. Segregation of defendant in place of detention. All of the proceedings except proceedings on the motion under section 54-76c had under the provisions of sections 54-76b to 54-76n, inclusive, shall be private and shall be conducted in such parts of the courthouse or the building wherein

court is located as shall be separate and apart from the other parts of the court which are then being held for proceedings pertaining to adults charged with crimes. If such defendant is committed while such examination and investigation is pending, before trial, during trial or after judgment and before sentence, those persons in charge of the place of detention shall segregate such defendant, to the extent of their facilities, from defendants over the age of eighteen years charged with crime.

Sec. 54-76i. Court powers over person of defendant. Pending and during the investigation, trial, adjudication or acquittal of the defendant, or any other proceedings under sections 54-76b to 54-76n, inclusive, the court to which the recommendation for the investigation has been made shall have the same powers over the person of the defendant as it would have in the case of an adult charged with crime.

Sec. 54-76j. Penalties on adjudication as youthful offender. Probation. Narcotic users. Commitment. The court, upon the adjudication of any person as a youthful offender, may (1) commit the defendant, (2) impose a fine not exceeding one thousand dollars, (3) impose a sentence of conditional discharge or a sentence of unconditional discharge (4) impose a

sentence of community serve, or (5) impose sentence and suspend the execution of the judgment. In the latter case, the defendant may be placed on probation for a period not to exceed three years, provided the court in its discretion may from time to time, while such probation is in force, extend such probation for a period not to exceed five years, including the original probationary period. If the court has reason to believe that the person adjudicated to be a youthful offender is or has been an unlawful user of narcotic drugs as defined in section 21a-240, and the court places such youthful offender on probation, the conditions of probation, among other things, shall include a requirement that such person shall submit to periodic tests or determine, by the use of "synthetic opiate antinarcotic in action," nalline test or other detection tests, at a hospital or other facility, equipped to make such tests, whether such person is using narcotic drugs. A failure to report for such tests or a determination that such person is unlawfully using narcotic drugs shall constitute a violation of probation. Commitment hereunder shall be for a period not to exceed three years and shall be to any religious, charitable or other correctional institution authorized by law to receive persons over the age of sixteen years.

Whenever a youthful offender is committed by the court to any duly authorized religious, charitable or other institution, other than an institution supported or controlled by the state or a subdivision thereof, such commitment shall be made, when practicable, to a religious, charitable or other institution under the control of persons of the same religious faith or persuasion as that of the youthful offender. If a youthful offender is committed by the court to any institution other than an institution supported or controlled by the state or a subdivision thereof, which is under the control of persons of a religion or persuasion different from that of the youthful offender, the court shall state or recite the facts which impel it to make such disposition, and such statement shall be made a part of the record of the proceedings.

Sec. 54-76k. Determination of youthful offender status not to disqualify for office, license, etc. No determination made under the provisions of sections 54-76b to 54-76n, inclusive, shall operate as a disqualification of any youth subsequently to hold public office or public employment, or as a forfeiture of any right or privilege to receive any license granted by public authority and no youth shall be

denominated a criminal by reason of such determination, nor shall such determination be deemed a conviction.

Sec. 54-761. Records confidential. The records of any youth adjudged a youthful offender, including fingerprints, photographs and physical descriptions, shall not be open to public inspection, but such fingerprints, photographs and physical descriptions submitted to the state police bureau of identification of the division of state police within the department of public safety at the time of the arrest of a person subsequently adjudged a youthful offender shall be retained as confidential matter in the files of such bureau, and be opened to inspection only as hereinafter provided. Other data ordinarily received by such bureau, with regard to persons arrested for a crime, shall be forwarded to the bureau to be filed, in addition to the fingerprints, photographs and physical descriptions as mentioned above, and be retained in the division as confidential information, open to inspection only as hereinafter provided. The court in its discretion, in any case, may permit an inspection of any papers or records and (1) such papers and records or any part thereof shall be made available to any judge for consideration in sentencing any person who has been convicted of a felony, as defined in section 53a-25 or

an adult probation officer, if requested by him, for the purpose of making the investigation ordered under section 54-91a, with respect to the sentencing of such person; and (2) information obtained from such papers and records concerning the disposition of the case shall be made available to the victim of the crime if requested by him prior to the erasure of such papers and records under the provisions of section 54-76o, provided such information shall not identify the youthful offender involved, except that (1) the identity of the person charged may be released to the victim upon written application by such victim to the court stating intent to bring a civil action for loss or damage resulting from such act; and (2) the identity of a person adjudged a youthful offender may be released to the victim upon written application by such victim to the court. Any institution to which a youth is committed shall have the right to inspect any of the records of any person committed to it as a youthful offender without a court order.

Sec. 54-76o. Erasure of police and court records of youthful offender. Whenever any person has been adjudicated a youthful offender and has subsequently been discharged from the supervision of the court or from the case of any institution or agency to

whom he has been committed by the court, all police and court records pertaining to such youthful offender shall be automatically erased when such person attains twenty-one years of age, provided such person has not subsequent to being adjudged a youthful offender been convicted of a felony, as defined in section 53a-25, prior to attaining such age. Youthful offender status shall not be deeded conviction of a crime for the purposes of this section. Upon the entry of such an erasure order, all references including arrest, complaint, referrals, petitions, reports and orders, shall be removed from all agency, official and institutional files. The persons in charge of such records shall not disclose to any person information pertaining to the record so erased. No youth who has been the subject of such an erasure order shall be deemed to have been arrested ab initio, within the meaning of the general statutes, with respect to proceedings so erased. Copies of the erasure order shall be sent to all persons, agencies, officials or institutions known to have information pertaining to the proceedings affecting such youth.

NO: 53529	:	SUPERIOR COURT FOR
	:	THE HARTFORD/
STATE OF	:	NEW BRITAIN J.D.
CONNECTICUT	:	
	:	AT HARTFORD
VS.	:	
	:	
KAREN E. APARO	:	MAY 25, 1988

EXCERPTS FROM TRIAL COURT'S DENIAL OF YOUTHFUL OFFENDER ELIGIBILITY ON MURDER COUNT AND THE GRANTING OF ELIGIBILITY ON THE CONSPIRACY TO MURDER COUNT DATED MAY 25, 1988

(begins on page 2 of transcript)

THE COURT: Gentlemen, I take it that there was no appeal on the court's ruling last week?

MR. SANTOS: That's correct, Your Honor.

THE COURT: Not that I was right, but somebody thought I was I guess. All right, this is your matter, Mr. Santos, on the application for youthful offender treatment?

MR. SANTOS: Yes, Your Honor.

THE COURT: You wish to put something on the record.

MR. SANTOS: Yes, Your Honor. I've reviewed the probation report that was submitted in this matter and also my client and her father also reviewed

it. It should reflect that her father, who has been previously appointed guardian, Mr. Aparo is present and in court.

I've reviewed the probation report concerning our application for youthful offender statute. We submitted to the court on March 15th, 1988 an amended motion for an order to determine defendant's eligibility for treatment as a youthful offender, together with attachments which included a report from the Department of Child and Youth Services and also a report from Norwalk Hospital that concerns a suicide attempt by my client when she was twelve years of age.

We also submitted on May 19th a defendant's submission in support of youthful offender application and appended thereto are letters from the victim's mother, the victim's brother and the victim's sister, all urging the court to grant youthful offender status to Karen.

Now, Your Honor, at the threshold, let me address this question of eligibility. The defendant is charged here with accessory to murder which is a class A felony, and with conspiracy to commit murder which is a class B felony. And it's generally agreed that as far as the class B felony, that is the conspiracy count, she is eligible for youthful offender treatment. As

far as the class A felony, the State takes the position that she's not eligible because it's not provided --- it's a disqualification in the statute. And so -- and I thought that too, for many years, because for many years we've been submitting the youthful offender form and if you look at the form, the form says that you have to swear that you've not been charged with a class A felony. And the fact of the matter is, there's nothing in our statutory scheme that says that. Our statute is quite clear in the definitional section 54-76b that a youthful offender means a youth who has committed a crime or crimes which are not class A felonies. And it's quite

clear that the statute uses the word committed and does not use the word charged, although the form uses the word charged. And in the -- and, as a matter of fact, in State versus Longo, the Supreme Court of Connecticut that Mr. Thomas cites, the Supreme Court quotes the form and quotes it incorrectly by saying that a person charged with a class A felony is disqualified. In order to take that position, Mr. Thomas would have to ignore the word committed which is in black and white under 54-76b as clear as day.

THE COURT: Mr. Santos, using your argument, if it has to be a situation where the youth has committed the

offense, under the statute, wouldn't the client have to come into court and say I did this, but I'm asking you to treat me as a youthful offender?

MR. SANTOS: No.

THE COURT: That's unconstitutional.

MR. SANTOS: There would have to be a trial. There would have to be a finding, either -- in some way. Okay, either a -- say, preponderance of the evidence hearing or an actual trial on the merits where the court would have to make a finding that this defendant committed the crime. Otherwise, Your Honor, it's a denial of due process to disqualify someone simply because they're accused of a crime. In other

words, it goes to the fundamental basis of the due process protection we all enjoy. To say that a person is disqualified on a mere accusation defeats, it seems to me, the due process protection we all enjoy. And there's a very practical aspect to this, Your Honor.

THE COURT: I understand what you're saying, Counselor.

MR. SANTOS: Well, you take a case where the defendant is tried, and as Your Honor knows, we have many cases where the accusation's murder, the verdict's manslaughter. Or try a case, the verdict's negligent homicide or the verdict's not guilty. To permit disqualification on the mere

accusation, obviously that person would be eligible if he or she were charged with manslaughter or if he or she were charged with negligent homicide. You know, New York had this specific problem. The problem is this, Your Honor: Connecticut adopted our youthful offender statute patterned after the New York law in 1971. The New York law in 1971 disqualified a youth if he or she were accused of a class A felony. That was the language of the New York statute. So thereafter somebody started writing a law review article that simply repeated what the New York statute said, that if you're accused of a class A felony you're disqualified. And then someone drafted

a form that said the same thing. The New York statute was declared unconstitutional in 1976, in the case of People against Drummond which we cite in our memorandum, 49 New York 2d 990, 391 New York Supplement 2d 67 and the Northeast cite is 359 Northeast 2d 663. That statute was declared unconstitutional because the court said to disqualify someone on a mere accusation is a denial of due process. And what they've really done in New York now, they amended the statute. And what the statue now provides basically is, youthful offender status is treated as a sentencing alternative that the judge has. In other words, a person is tried, if she is convicted or

he is convicted then the youthful offender provision is used as a sentence alternative.

Now, what Your Honor is saying to me, and this is a very real problem -- I mean, I personally think the whole youthful offender scheme is unconstitutional for a number of reasons.

THE COURT: It would have to be if you use your logic or your reasoning.

MR. SANTOS: Yes, I think it is. In other words, I don't --- what Your Honor -- what Your Honor is going to ask me and what Mr. Thomas is going to say, well, what do we do? What do we do if Mr. Santos is right and the word committed means committed? I mean, the

statute says committed. And what does that mean? It's not the court's problem. It's the legislature, in my opinion, by using that word committed, has botched up the statutory scheme.

THE COURT: A little word like allegedly in there might have been appropriate.

MR. SANTOS: Or allegedly committed or accused. But they -- it's quite clear what it says. And I don't think there's any room of ambiguity.

THE COURT: But again, Mr. Santos, using your reasoning, if it has to be proved that the accused committed the offense, there would have to be some sort of trial, there would have to be a finding of guilty. This would not --

this would be open to the public. It would defeat the whole purpose of the youthful offender statute.

MR. SANTOS: Well, I would submit --

THE COURT: Using your interpretation.

MR. SANTOS: -- to the court -- no, I don't agree with you. I don't agree with you.

THE COURT: Well, I don't know how -- how are you going to do it? How are you going to do it?

MR. SANTOS: I would submit that the procedure would be a closed hearing, a closed hearing pursuant to the other provisions of the statute where a defendant, if eligible, -- in

other words, what I'm saying to the court is, eligibility must revolve around whether she committed this crime. There should be a closed hearing. In essence, a minitrial where the state would be required to prove that this defendant committed the crime. The question would be what is the burden of proof? There would have to be a burden of proof that would have to be established. In other words, the court would have to fashion a judicial remedy to reconcile what appears to be the clear provision of the law that a person is not disqualified unless he has committed a class A felony. And I submit to Your Honor there'd have to be closed trial under the youthful

offender provisions, in light of the spirit of the act, and the court would have to make a determination as to whether or not this defendant committed the crime.

And I submit to the court, to do otherwise would be to deny this defendant due process of law both under our state and our federal constitution, because there is plenty of evidence in this case already that would lead a jury, at a minimum, to find this defendant guilty of something other than intentional murder. There is plenty of evidence already in this case of the abuse, the neglect, the harassment, the mental torture inflicted on this young lady by the

mother that would lead a jury to find her either not guilty or guilty of some lesser offense other than a class A felony. And I submit to the court that there has to be some judicial remedy that has to be fashioned by the court so that her due process rights are protected.

Now, those -- so-- and I would say -- that's number one. So consequently, I think that that provision, to the extent that the State argues that she's disqualified the class A felony because she's charged is unconstitutional. For Your Honor to exercise his discretion under 54-76d and to say she's disqualified because she's charged with a class D felony -- I mean a class A

felony, we would also submit is unconstitutional because Your Honor is basing that on the accusation brought to the court by the State's Attorney's Office. And, once again, it would be a denial of due process to do that.

What we need to do in Connecticut is what they did in New York. They changed -- they rewrote the youthful offender law when a judge declared it unconstitutional. They rewrote it in 1976. In matter of fact, New York, Your Honor, I would submit to Your Honor, these facts too. In another case -- in another case in New York, People against Kendell[1], 60 -- 308 New York Supplement 2d 572, a court granted

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[1]spelled phonetically

a writ of habeas corpus in that state on the ground that their youthful offender statute that required a defendant to waive a jury trial to get youthful offender treatment was unconstitutional. Our youthful offender statute has never really been challenged in our courts because it's never ripe for adjudication. In other words, you have a situation where a person applies and is denied or is granted, there's no interlocutory appeal. And very few cases have made their way up to the Supreme Court that really have challenged this statute or I don't think many people have examined it that closely.

THE COURT: Apparently the only one that any way involved in an appeal of a youthful offender matter is State versus Longo.

MR. SANTOS: Right, where they shifted the sands on what is a final judgment. And I say again, in Longo, they simply quote that form because it's quite clear to me, when that statute says committed it has to mean committed, it can't -- most -- and plus, you'd have this other rule of construction, I would submit to the court. We are dealing with a penal system here, a penal statute that has to be construed strictly. And ...

(ends on page 10 of transcript)

(begins on page 36 of transcript)

O R D E R S

THE COURT: It's interesting, the arguments presented by Mr. Santos, because the same thought occurred to me as he was arguing, about the question of committed and charged and what the consequences were of those words. Because if you read the statute as it's written now, it would seem to indicate, the way I look at it, that in order to grant YO eligibility, and not -- forgetting the fact that this is a class A felony that we're talking about, I'm talking about the ordinary everyday affair of a Youthful Offender Application, it would seem to indicate

that the words committed would mean, in my opinion, that an accused person would have to come into the courtroom and say, I did that crime, and I'm admitting I did that crime; I want to be treated as a youthful offender. And I don't think that that was the purpose of the statute. Of course, that's my opinion. Because if that were the purpose of the statute, it would be a ridiculous result. The court, seems to me, has to be bound by what is our present law in this state as set forth by the State of Connecticut by our Supreme Court in State versus Longo. And it's very specific in it, opinion by Justice Speziale, he doesn't refer in the opinion to committed, he refers

to a charge. To me, that's our case law at the time, that an accused is charged.

I think you have a great argument, Mr. Santos. Perhaps one that can be taken up in front of the Supreme Court. But I personally feel that I'm bound by the wording of the case on page ninety-two in State versus Longo, as the Supreme Court interpreting the statute to mean a person who is charged.

But to go on in State versus Longo, refers to the right to apply for the youthful offender status. But it goes on to say that the decision as to whether youthful offender status should be granted is within the trial court's

discretion and that no defendant has a right to that privilege until a court accords the defendant that status.

It's a discretionary matter with the court. Our statute is very specific, it excludes class A felonies. We have a class A felony charged here.

On the basis of our case law and our statute, the court will deny your application for youthful offender treatment on the class A felony. Again, seems rather ridiculous but, by the same token, that same statute would indicate that class B felony is one which your client could be adjudicated as a youthful offender.

The court will make a finding that on the charge of conspiracy to commit murder that the defendant is eligible to be treated as a youthful offender. But in taking into consideration all of the circumstances surrounding the offense, including the severity of the crime, the fact that it's a class A felony, the interpretation of the statute by the Supreme Court in State versus Longo, the court is going to exercise its discretion and deny the application as treatment of a youthful offender on the class A felony.

In affect, what I'm doing is spliting it. I'm saying you are eligible on one side; you're not

eligible on the other. But that's the adjudication of the court. You have an exception, naturally.

I would ask the court monitor to transcribe the remarks that I just made and make it part of the record.

MR. SANTOS: Your Honor, may I just ask the court? In other words, you're denying it on both counts?

THE COURTS: No. I thought I gave you that understanding. I denied it as to the class A felony, I granted it as to the class B felony.

MR. SANTOS: Thank you, Your Honor.

MR. BAILEY: Your Honor, you may want to, when you get the transcript, examine your remarks because I believe you used class A when you meant class B.

THE COURT; If I did, I didn't mean it that way because I definitely -- my intention definitely was to deny the eligibility as to the class A felony and to grant the eligibility as to the class B felony. The record will reflect that.

MR. SANTOS: Thank you, Your Honor.

THE COURT: Any further proceedings at this time?

MR. THOMAS: Just as to a question of dates, Your Honor. I imagine this will require filing a Youthful Offender

Information as to the second count and having the first count returned to the adult docket. I'll leave it to Mr. Santos to indicate what dates.

THE COURT: You wish to have the matter continued on the trial list for a period of three weeks, Mr. Santos?

MR. SANTOS: Yes, Your Honor.

MR. THOMAS: And what about the youthful offender matter, your Honor?

THE COURT: The whole procedure continued for three weeks. Youthful offender matter could be taken up at that time.

MR. THOMAS: So that one count goes on the adult docket and one count goes --

THE COURT: Right.

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NO:53529	:	SUPERIOR COURT
	:	
STATE OF CONNECTICUT	:	AT HARTFORD
	:	JD OF HARTFORD
VS.	:	/NEW BRITAIN
	:	
KARIN E. APARO	:	HEARD JULY 8, 1988

EXCERPTS FROM TRIAL COURT'S REVOCATION OF YOUTHFUL OFFENDER ELIGIBILITY ON THE CONSPIRACY TO MURDER COUNT DATED JULY 8, 1988

(begins on page 2 of transcript)

THE COURT: This is State versus Karin Aparo, docket number 53529. I will make sure before I say anything, that only the personnel in this courtroom are those who are entitled to be here. This is a youthful offender matter. I assume there is no one here that should not be here?

MR. SANTOS: May I just indicate, your Honor, I have with me Mr. Ned Hickey, who is a law student working on this matter in our office and I think it's appropriate.

THE COURT: He is a member of your office?

MR. SANTOS: Yes.

THE COURT: All right.

MR. THOMAS: And also--

THE COURT: Any objection?

MR. THOMAS: Also for the record, there is a Mr. Patrick Finn who is a legal intern in our office, your Honor.

THE COURT: All right. Before I ask counsel to say anything at all, there's something I do want to put on the record. After listening to argument by counsel at the time the motion was made for the granting of youthful offender eligibility for this defendant, that very same evening, I think that was May 25th, the more that the Court thought about what it had done on that particular day, it became apparent to the Court that the ruling was something that should not have been

made by this Court. I could not see how, after I thought about it, these matters could be separated from -- into a youthful offender and a regular court, part A proceedings. Because the file, in essence, by a youthful offender proceedings, the file would have had to have been sealed to the public, but that same file would then be an integral part of the Part A proceedings. So, in effect, burning candles at both ends and you just can't do that. There is no way that the file can be sealed on a youthful offender proceeding and not sealed on Part A proceedings. So the more I thought about it, the more I thought this matter had to be considered as one

entity in Part A and not in -- to be split between a youthful offender and Part A proceedings. I immediately informed Judge Arena the following morning and I might note for the record that Judge Aaron Ment was in chambers at the same moment. That I intended to ask that this matter be reassigned for the further proceedings on the part of the Court for purposes of denying the application for youthful offender treatment and restoring the matter to the regular docket, Part A docket. In the meantime, before that matter was assigned for a further hearing, the State filed a Motion for Reargument of the motion for youthful offender treatment. But I want the record to be

very explicit that the Court's decision to reopen this matter was made on behalf of the Court itself the day after the granting of the youthful offender proceedings and before any motions were filed by the State and before any so-called alleged publicity through the media came to the attention of the public. So I want the record to be perfectly clear that when this Court is considering or reconsidering this motion, that in no way is the Court being affected by any publicity that has been in the newspapers, on the press, the radio or the television. This Court is taking this proceeding on its own, as a result of what I have already put on the record. We do have

a formal request, the motion filed by the State of Connecticut for reconsideration. We have a number of motions filed by the defendant, including Objections to the Motion to Reargue, Motion for Immediate and Speedy Trial of Not Guilty Plea, and Motion for Evidentiary Hearing. I know that Mr. Santos wishes to put a number of things on the record and I'm going to give him that opportunity to do so. There is also a Motion to Oppose Sanctions. I have informed Mr. Santos and Mr. Thomas that it is this -- the intention of this Court to reopen this matter and to proceed along the lines

that I've already discussed. Now I know Mr. Santos, you have objections that you wish to put on the record.

MR. SANTOS: Yes, your honor. Thank you, your Honor. Your Honor, first of all, the record should reflect that we forwarded to the Court on June 2nd, various -- three motions which I sent the originals to the Court because this was a sealed file and I wanted to make sure that they --

THE COURT: I have already referred to those motions, counselor.

MR. SANTOS: Right, and that's part of what we want to put on the record. Defendant's Objection to the State's Motion to Reargue and Defendant's Motion to Dismiss and

Impose Sanctions, Defendant's Motion for Immediate and Speedy Trial of Not Guilty Plea and the Defendant's Motion for an Evidentiary Hearing. Now our first claim, your Honor, is that -- and I might put this on the record, although your Honor apparently had decided that evening to, on it's own, reconsider it's ruling, this is the first that I've received notice of that from the Court and we were never advised by anyone that the Court, on it's own, was going to reconsider it. As a matter of fact, the first I heard about it was on a television news show on Friday after the Court had ordered youthful offender status for this

defendant. I was watching channel 30 TV and I saw a report that the State was going to move to reconsider the Court's ruling. The following Monday, the State's Attorney, Mr. Bailey, held a press conference where he announced that he was going to move to reconsider the Court granting youthful offender status. That press conference was -- was televised on Channel 3 at the 6:00 p.m. and the 11:00 p.m. news and then the Hartford Courant wrote a story the next day that Mr. Bailey had indicated he was going to move to revoke or ask the Court to revoke the youthful offender status. So, then -- then, after that all happened, I received a written motion dated May 31st, Motion

to Reargue signed by Mr. Thomas, where the State lists no grounds as the basis for asking the Court to consider reargument. That's by way of background. Our position is this, your Honor. The Court has no power to entertain reargument on this matter and the reason for that is, is multifold. This defendant, right now, is a youthful offender. She has a vested right as a youthful offender. I don't think there has been -- I know of no case where a defendant has been granted youthful offender status where a Court subsequently revokes it.

THE COURT: No reported cases?

MR. SANTOS: No reported cases and I, in my practice, I know of no case where once it's been granted, without something happening, in other words, without some type of misconduct by the defendant, without some type of fraud on the Court, for example that she wasn't the proper age, without something, some event happening where the Court has revoked it because that's basically what the Court is doing here is revoking her youthful offender status because once the Court granted her youthful offender status she then had a vested right as she has today. She's been a youthful offender now since May 25, 1988. So she's had a youthful offender status. So the

question is constitutionally, once a defendant has a vested right, what -- number one, does the Court have the power to revoke it and number two, what are the procedures by which a Court has the power to revoke it.

Now first of all, we don't -- we think they Court is without power to revoke it and we say that because the youthful offender statute has some unique language in it that none of our other laws really have. It says in 54-76d as in David, subsection B, if the Court determines that the defendant is eligible to be so adjudged a youthful offender, no further action shall be taken on the information or complaint and the defendant shall be

required to enter a plea of guilty or not guilty to the charge of being a youthful offender. This statutory provision specifically prohibits the Court from reopening or reconsidering reargument, what have you, because it's very explicit in its language that no further action shall be taken by the Court once the youthful offender status is granted, and the youthful offender status having been granted on May 25th, the Court cannot take further action. I might indicate, we mailed in, on one of our motions which I just referred to, we mailed in a not guilty plea --

THE COURT: Yes, I know. I received it.

MR. SANTOS: -- on behalf of this defendant. But I think that that language is pretty clear, which we don't really have anywhere else in our statutory scheme. If the Court determines the defendant is eligible to be so adjudged, no further action shall be taken on the information and the complaint and that's what the Court is doing, taking further action. So we don't think the Court's within the power. Now there is one case that I know of, State vs. Brown, 8 Connecticut Appellate, 248. It's not a youthful offender case but it is a case where Judge -- the late Judge Fishman dismissed an information based upon a motion that the State had not complied

with discovery and defense counsel made the argument there had been a noncompliance with discovery and moved to dismiss. Judge Fishman heard both sides and he dismissed it. When he entered the order of dismissal, the State's Attorney took an exception and the same day, the same day, moved to reargue. A few days later Judge Fishman entertained reargument and the defense said the Court had no power to hear reargument but the Appellate Court said, look it, there were three factors that compelled -- that was proper reargument. Number one, the State took an exception when the Court dismissed it. Number two, the State moved to reargue the same day and number three,

a misrepresentation had basically been made to the Court that the State had not complied with discovery. The State had complied with discovery and the Appellate Court went to great pains to say under those circumstances, those limited circumstances, the Court still had the power to reconsider its ruling in that particular case.

THE COURT: Mr. Santos, how do you divorce one proceeding against the other as far as the factual pattern is concerned, other than the difference in the charge?

MR. SANTOS: Well, it's very simple, your Honor. The conspiracy case, of course, covers a much broader time period.

THE COURT: I understand that, and it's a lesser offense.

MR. SANTOS: Well, it would not be a lesser offense to murder but it would -- it's a, practically speaking, a lesser offense, a Class B -- I'm sorry. Your Honor meant it was a Class B felony.

THE COURT: Yes, it's a Class B felony, but it's all in the same factual pattern, isn't it?

MR. SANTOS: It's related but it's much broader, much broader.

THE COURT: I understand that.

MR. SANTOS: All right.

THE COURT: But it all comes out of the same happening.

MR. SANTOS: Your Honor, that is not, I don't think, an appropriate consideration. The legislature drafted the statute, all right? And they, for some reason, as we indicated, put down that the defendant who's committed a Class A felony, is ineligible. It did not say a person who committed a Class A felony and also charged with a Class B felony is ineligible.

THE COURT: No, it doesn't, but the statute also says the granting of a youthful offender application is discretionary with the Court under certain factual situations.

MR. SANTOS: I agree.

THE COURT: And I think that my granting the youthful offender application on this particular charge was an abuse of discretion on my part and I am willing to admit that and I don't see how the factual pattern involving the same circumstances can allow this Court to split this -- these charges from Part A to a youthful offender offense.

MR. SANTOS: Just for the record, we already made this argument to the Court, why the Court can do this.

THE COURT: Yes, I know that, in the prior cases.

MR. SANTOS: And that prior record that we made on May 25th, I would simply like to incorporate our argument

today so we have that complete record when we go to the Supreme Court. But basically, your Honor, this case would be no different if this defendant -- if this prosecution started in the Juvenile Court, which we think it should have, because the allegations were the conspiracy started when she was 15. The murder case would come up here but the conspiracy case could not be transferred because the State would have to satisfy certain conditions that it could not. Subsequently, you would have one proceeding in the Juvenile Court and one proceeding in the adult court. The juvenile proceeding would be sealed as a matter of law and it's very -- and all the Legislature did

when they adopted the youthful offender law, when juvenile jurisdiction got turned back, when the clock got turned back in essence, from 17, which used to be our juvenile jurisdiction, they then created the youthful offender statute in order to protect 16 and 17 year olds who were now no longer juveniles. You have the same circumstance and this is what these so-called experts don't understand, the comment to the press about whatever the courts rulings are. All the youthful offender law was designed to do was design, in appropriate cases, the same type of protection available in Juvenile Court.

THE COURT: You just used the key word, appropriate.

MR. SANTOS: I know that, your Honor, but your Honor most certainly thought on May 25th it was appropriate.

THE COURT: Yes, at the moment, as I've indicated.

MR. SANTOS: But I don't think, with all due respect to the Court, once she has the status, that that's a legally justifiable ground that, I've changed my mind.

THE COURT: I don't think --

MR. SANTOS: On the exercise of discretion.

THE COURT: I understand you are using the argument trying to equate this proceeding with a juvenile matter

but they are two separate and distinct statutes. This is not a juvenile matter, but go ahead.

MR SANTOS: I am trying to touch upon what power the Court has now. I indicated I don't think the Court has the power of the language of the statute but also when the Court now says, the reason I'm changing my mind, the reason I'm basically reversing myself is that it's -- it's a discretionary act as to whether I'm going to grant youthful offender status, I exercise my discretion to grant it but now I feel I was wrong and that I'm changing my mind. Well, I'm saying that I don't think the Court has the power to do that for this reason.

THE COURT: I understand that.

MR. SANTOS: She is a youthful offender. You have certain Federal and State Constitutional rights now. In other words, there are a line of cases in our federal law that talk about when a person has an entitlement, you can't take that entitlement away from that person without due process of law and the cases go on and they talk about tenure teachers. They talk about welfare recipients, they talk about people who have certain vested rights. Once those -- that category of persons have those vested rights, that right cannot be taken away without procedural due process under both the Federal and State Constitution. What the Court is

saying is yes, you are a youthful offender as you stand in front of me today, but I have changed my mind in terms of the exercise of my discretion. I don't think the Court has the power to do that because that does not comport with procedural due process.

THE COURT: That's a situation the Supreme Court is going to have to decide, isn't it?

MR. SANTOS: In other words, let me just make the record clear. If the Court has any power to do this, which I obviously would say that it doesn't, there has to be some type of separate proceeding that comports with procedural due process to take this right away from this defendant. The

same type of procedural due process protection that we have in the entitlement cases that I've referred to....

(ends on page 15 of transcript)

(begins on page 24 of transcript)

MR. SANTOS: Can I get something clear, your Honor? I came here today because the State had filed a Motion to Reargue. Now Mr. Thomas is apparently saying, here we are on the Court's motion or is it on the State's Motion to Reargue? I mean, that's what I -- that's the only notice I ever got is that the State filed a Motion to Reargue that it would -- and you know, now I'm hearing that it's not the

State's motion we are here on. I heard what your Honor said on the record as to your own thought processes, but I never got notice of that until to today.

THE COURT: At this point, Mr. Santos, perhaps we just ought to have the record show the Court will consider the State's Motion to Reargue.

MR. SANTOS: All right.

THE COURT: Now you can take an exception to that.

MR. SANTOS: Yes, your Honor, I'll take an exception and we also would ask this, your Honor, if your Honor is going to consider reargument, then I would like the Court, -- Of course,

I've already made this request for an evidentiary hearing. Is your Honor denying that?

THE COURT: Yes.

MR. SANTOS: May I have an exception?

THE COURT: Yes.

MR. SANTOS: And might the record reflect that in our motion of June 2nd which I've alluded to, that is our Defendant's Objection to the State's Motion to Reargue, Defendant's Motion to Dismiss and Impose, that motion is our offer of proof as to what we would show had the Court permitted an evidentiary hearing, specifically paragraphs one --

THE COURT: Six, seven --

MR. SANTOS: Well, it actually five, six, and seven.

THE COURT: And eight.

MR. SANTOS: And eight. Okay. And furthermore, we filed a motion today which has the article attached to it and I assume there is no, -- we also would, in our further offer of proof on today's motion , Motion to Further Impose Sanctions, our offer of proof would be paragraphs one, two, three, four and the attached article. We also attached an article which also would be part of our offer of proof in the June 2nd motion. But if the Court is now going to consider reargument, I would ask the Court, we feel we have a right to immediately appeal the Court's

decision to consider reargument before the Court actually rules on the issue of whether or not this defendant is eligible for youthful offender status and we base that on the language of State versus Longo. That once a defendant has been deemed eligible for youthful offender treatment, that any action by the Court that threatens that eligibility is immediately appealable. I quote to the Court from Longo. For an interlocutory order to be an appealable filed judgment, it must threaten the preservation of a right that the defendant already holds. The right itself must exist independently of the order from which the appeal is taken. Where a decision has the effect

of not granting a particular right, that decision, even if erroneous, does not threaten the defendant's already existing rights. We also stress that the distinction is not one of constitutional rights versus statutory rights. If a statute vests all criminal defendants or a class of criminal defendants with a right to certain protections, a defendant within that class may appeal immediately a trial court order that plausibly threatens the right irreparably. Again, the dispositive issue is whether the defendant already enjoys a right that the order threatens irreparably. If so, the order may be appealed immediately, and our position is once

the Court permits reargument, then the right -- the right that this defendant has to youthful offender status, to youthful offender eligibility which she now holds, is threatened and subsequently I'm asking the Court to stay these proceedings so we may appeal this issue and this appeal would be limited to the question of whether or not the Court has the power to entertain reargument which apparently it just has.

THE COURT: Mr. Thomas, do you want to reply to that?...

(ends on page 27 of transcript)

(begins on page 29 of transcipt)

MR SANTOS: May I have an exception?

THE COURT: Certainly you have an exception to that.

MR. SANTOS: Thank you.

THE COURT: And so that we may have the record clear for whatever Appellate Court this matter goes to, the motion of -- defendant's Motion for Evidentiary hearing dated June 2nd is denied, Defendant's Motion for Immediate Plea, Immediate and Speedy Trial and Not Guilty Plea is denied, defendant's objection to the State's Motion to Reargue and Defendant's Motion to Dismiss and Impose Sanctions is denied and the Motion to Impose Sanctions dated July 8th, 1988 are denied.

MR. SANTOS: Exception.

THE COURT: Does that complete the record, your Honor?

MR. SANTOS: Yes. May I have an exception to those?

THE COURT: Certainly. The Court will order this matter restored to the criminal -- to the regular criminal docket.

MR. SANTOS: All right.

THE COURT: You have an exception to that.

MR. SANTOS: Yes, your Honor. I just want the record to be clear. All my prior arguments that we made on May 25th are incorporated?

THE COURT: Are incorporated.

MR. SANTOS: I don't have to repeat everything?

THE COURT: Certainly not.

MR. SANTOS: If I could just put one thing on the record, your Honor. In the exercising -- if what your Honor is saying in looking at the matter now and exercising his discretion, one of the things obviously that the Court would do when exercising his discretion is to take into consideration the defendant's background and I would just like the record to reflect that she has come -- Well, the defendant, there's a couple of facts that were not before the Court last time....

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NO: 13476	:	
STATE OF CONNECTICUT	:	SUPREME COURT
V.	:	STATE OF
	:	CONNECTICUT
KARIN APARO	:	APRIL 11, 1989

STATE'S MOTION TO DISMISS DEFENDANT'S APPEAL

The State of Connecticut-appellee hereby moves this Court to dismiss the defendant's pre-trial appeal challenging the trial court's denial of youthful offender eligibility, on the ground that it is not taken from a final judgment. State v. Longo, 192 Conn. 85, 469 A.2d (1984).

I. BRIEF HISTORY OF THE CASE

The defendant was charged by information with the Class A felony of being an accessory to murder, in

violation of General Statutes §§53a-54a(a) and 53a-8; and with the Class B felony of conspiracy to commit murder, in violation of §§53a-48(a) and 53a-54a(a). The defendant applied for youthful offender eligibility pursuant to General Statutes §54-76c.

On May 25, 1988, the court (Quinn, J.), denied youthful offender eligibility on the first count (accessory to murder), but granted it as to the second count (conspiracy to commit murder).

The state excepted to the ruling, and on May 31, 1988 the state filed a motion requesting the court to hear

reargument and to reconsider its grant of youthful offender eligibility on the conspiracy count.

On July 8, 1988, the court held a hearing on the state's motion.[1] At that hearing, the defendant argued, inter alia, that specific statutory language and due process considerations precluded the court from reconsidering its ruling on youthful offender eligibility.

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[1]At that hearing, the court stated for the record that prior to granting the state's motion the court had sua sponte decided on the day of its ruling (May 25) to reconsider its grant of youthful offender eligibility, and had already undertaken administrative procedures for further hearing on the matter. The court also stated that it was proceeding on the state's motion to reargue.

The court then reversed its prior grant of youthful offender eligibility, and restored the conspiracy count to the regular criminal docket. The court also ordered that the file remain sealed pending the defendant's appeal of its ruling.

The defendant filed this appeal on or about July 15, 1988.

II & III. SPECIFIC FACTS AND LEGAL GROUNDS RELIED UPON

A. Relevant Law

In Connecticut, an appeal is purely a statutory privilege accorded only if the conditions fixed by statute and by the rules of court are met. DeTeves v. DeTeves, 202 Conn. 292, 295, 520 A.2d 608 (1987); State v. Audet, 170 Conn. 337, 341-2, 365 A.2d 1082

(1976). An appeal is permitted only from a final judgment of the trial court. State v. Longo, supra; State v. Seravalli, 189 Conn. 201, 204 455 A.2d 852 (1983); General Statutes §51-197a(a); Practice Book §4000.

In a criminal case, the final judgment is usually the imposition of sentence. State v. Coleman, 202 Conn. 86, 89, 519 A.2d 1201 (1987); State v. Seravalli, supra, at 205. Only a narrow category of interlocutory rulings may be consider final judgments for purposes of appeal. State v. Spendolini, 189 Conn. 92, 94-5, 454 A.2d 720 (1983); State v. Moeller, 178 Conn. 67, 68-9, 420 A.2d 1153, cert. denied, 444 U.S. 950 (1979). Where an

otherwise interlocutory ruling cannot, if erroneous, later be remedied by appeal after trial, the ruling may be deemed to possess the attributes of a final judgment and an appeal may be taken. Id. "The common thread running through [recognized] exceptions [to the final judgment rule] is that the right asserted would be lost, probably irretrievably, unless interlocutory review was permitted." State v. Spendolini, supra (citation omitted).

The test for finality when a party appeals from an interlocutory ruling was set forth in State v. Curcio, 191 Conn. 27, 31, 463 A.2d 566 (1983):

> An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct

> proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them.

This Court has already held that the denial of youthful offender eligibility is not a final judgment, as it does not satisfy either prong of the Curcio test. State v. Longo, supra. The court's ruling on youthful offender eligibility cannot be considered "separate and distinct from the guilt determining process." State v. Longo, supra at 89, quoting State v. Curcio, supra. An order concerning youthful offender eligibility is merely a step in the process of prosecuting the charges against the defendant. Youthful offender eligibility arises by

reason of the particulars of the criminal prosecution and must, by statute, precede any criminal trial of the charges. See §§54-76c, 54-76e, 54-76h, 54-76i, 54-76m. Thus consideration of eligibility to be adjudged a youthful offender is "incidental to the course of the litigation". State v. Parker, 194 Conn. 650, 655, 485 A.2d 139 (1984).

The salient issue in the present case is whether the trial court's denial of youthful offender status so concluded the rights of the defendant that further proceedings cannot affect them. State v. Curcio, supra. In order to prevail, the defendant must overcome the holding of Longo, and she

must do more than show that the trial court's ruling threatens her with irreparable harm; she must show that the ruling "threatens to abrogate a right that...she then holds." State v. Longo, supra, at 91.

It is important at this juncture to note that the defendant in her brief on appeal challenges the denial of youthful offender eligibility on both counts: accessory to murder and conspiracy to commit murder. The state will address each one separately.

B. The Denial of Youthful Offender Eligibility on the Accessory to Murder Count

The trial court denied youthful offender eligibility on the accessory to murder count on May 25, 1988.[2] The court then ordered that count restored to the regular criminal docket.

The defendant has made no effort to show that the court's ruling on this count threatened a right she then held.

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[2]The defendant did not file an appeal from that ruling within the required time frame for filing. See Practice Book §4009. She did not seek an extension of time for filing the appeal pursuant to Practice Book §4040(a). The present appeal was not filed until on or about July 15, 1988. To the extent that the present appeal challenges the denial of youthful offender eligibility on the accessory to murder count, it is untimely filed and should be dismissed on that ground. DeTeves v. DeTeves, supra, 298-99; Practice Book §4056.

State v. Longo, supra. She has wholly failed to demonstrate that further proceedings, including appeal after trial, cannot remedy any alleged error in that ruling. Id. Consequently, this Court should dismiss her interlocutory appeal on this issue. Id.

C. The Denial of Youthful Offender Eligibility on the Conspiracy Count

General Statutes §54-76d provides that the grant of youthful offender eligibility is wholly discretionary with the court. The eligibility therefore is not a "statutory right", as defendant claims, but is simply a privilege or benefit accorded by the Court in its discretion. See State v.

Longo, supra, at 92 (defendant does not have right to be accorded youthful offender eligibility).

The defendant stresses that fact that the court in the present case initially ruled that the defendant was eligible to be adjudged a youthful offender, then reversed its ruling after reargument. This procedural event does not satisfy the requirement that the court's ruling threatened a right then held by the defendant. State v. Longo, supra;[3] see State v.

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[3] In State v. Longo, this Court emphasized that "the right itself must exist independently of the order from which the appeal is taken." 192 Conn. at 93. Youthful offender eligibility can exist only by virtue of the court's exercise of discretion. Because the youthful offender statutes contemplate continued control over the case by the trial court, that court may continue to

Parker, supra, at 659 n. 8 (order revoking accelerated rehabilitation not an appealable final judgment). A defendant "has no statutory or constitutional right to youthful offender status unless he has been adjudicated a youthful offender." State v. Longo, supra at 93 n.5 (emphasis added).[4]

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exercise its discretion, at least until the start of trial pursuant to §54-76e. General Statutes 54-76d. The court may amend, revise or revoke its ruling during the investigation and consideration of the defendant's youthful offender eligibility. The court's action on July 8 revising its May 25 ruling was within its jurisdiction and its discretion, and did not affect any independent right.

[4]Once the defendant has been adjudicated a youthful offender, after a guilty plea or trial pursuant to §54-76g, the trial court may be powerless to alter that judgment. At that point the defendant's claim of unassailable

Even if the initial grant of eligibility could implicate a statutory right or interest sufficient to satisfy the second prong of Curcio, no such interest is implicated in the present case. See State v. Longo, supra, at 92 (recognizing that youthful offender eligibility affords protections of private trial and segregated confinement, without deciding whether such protections satisfy the second prong of Curcio). Because the murder count will be tried publicly, no privacy interest is at issue. See General Statutes §54-76h. The denial of youthful offender status on the murder count renders that file and

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right may be deemed to have merit.

potential trial open to public scrutiny; and the defendant must concede that the factual basis of both counts is substantially the same. Because the defendant is not incarcerated, no interest in segregated confinement is at issue at this time. Id. The only statutory interest possibly implicated is an interest in the penalties available to one adjudged a youthful offender. See General Statutes §54-76j. Any such right or interest may be enforced on appeal from a final judgment of the trial court. State v. Coleman, supra, at 91.

The only constitutional claim asserted by the defendant is premised on her right to due process. She

argues in her brief that the youthful offender statutes create a "liberty interest" of which she was deprived without due process. Defendant's Brief at 19-28. This Court has already recognized that the youthful offender statutory scheme itself does not create a distinct and independent liberty or property interest. State v. Longo, supra, at 92; see State v. Descoteaux, 200 Conn. 102, 107 509 A.2d 1035 (1986) (statute affording pretrial alcohol education program does not create cognizable liberty or property interest). Similarly, the court's initial grant of eligibility did not create a substantive liberty interest,

nor did the court's subsequent reconsideration implicate any substantive right.

The defendant's right to procedural due process was fully protected. She was aware of the state's exception to the grant of eligibility. She had notice of the state's motion to reargue and she had full opportunity to argue her position at the hearing before the court on July 8. Moreover, a ruling that is otherwise nonappealable does not become a candidate of interlocutory review simply because it was rendered without procedural due process. State v. Parker, supra, at 657.

In light of the foregoing, the defendant's appeal does not satisfy either of the Curcio requirements for exceptions to the final judgment rule. The appeal therefore should be dismissed.

RESPECTFULLY SUBMITTED
THE STATE OF CONNECTICUT

BY: _____
JUDITH ROSSI
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney

CERTIFICATION

I hereby certify that a copy of this document was mailed to Hubert J. Santos, Esquire, Buckley & Santos, P.C., 51 Russ Street, Hartford, CT 06106, on April 11, 1989.

_____
JUDITH ROSSI
Assistant State's Attorney

STATE OF CONNECTICUT
SUPREME COURT

NO. 13476

STATE OF CONNENCTICUT

V.

KARIN APARO : APRIL 26, 1989

O R D E R

THE MOTION OF THE STATE OF CONNECTICUT, FILED APRIL 11, 1989, TO DISMISS DEFENDANT'S APPEAL, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

O R D E R E D GRANTED

BY THE COURT

_____
CHIEF CLERK

NOTICE SENT: 4-26-89
Buckley & Santos
Judith Rossi, A.S.A.
Hon. Francis Quinn
Clerk, Hartford J.D.
(53529)

Record prepared
Transcript filed
no exhibits filed

STATE OF CONNECTICUT
SUPREME COURT

NO. 13476

STATE OF CONNENCTICUT

V.

KARIN APARO : JUNE 6, 1989

O R D E R

THE MOTION OF THE DEFENDANT, FILED MAY 9, 1989, FOR RECONSIDERATION OF THE STATE'S MOTION TO DISMISS DEFENDANT'S APPEAL AND ARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

O R D E R E D DENIED.

BY THE COURT

_____
CHIEF CLERK

NOTICE SENT: 6-6-89
Buckley & Santos
Judith Rossi, A.S.A.
Clerk, Hartford J.D.
(53529)
Hon. Francis Quinn